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90-858

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LOUIE V. PITTMAN, PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

WAYNE ZIEGENHORN, PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

ANTHONY W. BARTELS
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ATTORNEY FOR PETITIONER

QUESTION PRESENTED

The question presented is two-fold: First, shouldn't the Secretary of Health and Human Services take responsibility for the Agency's failure to comply with the administrative fee withholding provisions of 42 U.S.C. § 406? And, secondly, should the Eighth Circuit's ruling in Gowen v. Bowen be given retroactive application?

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OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, Anthony W. Bartels, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Pittman v. Sullivan, 911 F. 2d 42 (8th Cir. 1990), but is also attached hereto as Appendix A. The opinion of the District Court in Pittman v. Secretary of HHS is unreported, but is attached hereto as Appendix B. The opinion of the District Court in Ziegenhorn v. Bowen is unreported but is attached as Appendix C. The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc of the Court of Appeals is attached hereto as Appendix D.

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on August 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The relevant provisions of Title II of the Social Security Act, 42 U.S.C. § 406, 20 C.F.R. § 404.1720(b)(4), 20 C.F.R. § 404.1730(b), and 20 C.F.R. § 404.501(a)(8), are set forth in Appendix E.

STATEMENT

This case concerns 42 U.S.C. § 406 and 20 C.F.R. §§ 404.1720 and 404.1730, which involve fees for a representative's services on a Title II claim. In a Title II claim, the Social Security Administration is to withhold and pay the attorney's fee directly to the attorney from a claimant's past-due benefits. The case also concerns 20 C.F.R. § 404.501(a)(8), which provides for adjustment in cases where, through error, a payment of past-due benefits is made to an individual and

such payment has not been reduced by the amount of attorney's fees payable directly to an attorney under § 206 of the Act, 42 U.S.C. § 406.

1. Pittman: Anthony Bartels, attorney, represented Pittman on a claim appealing cessation of his disability benefits. Pittman drew interim benefits while his claim was pending. In October of 1986 his benefits were reinstated by the Secretary.

As an attorney's fee, Bartels petitioned for one-fourth of retroactive and interim benefits. In June 1987, the District Court awarded Bartels a fee of $1,782.16, or 25% of past-due benefits, whichever was less. The order expressly held that past-due benefits did not include interim benefits. In July 1987, the Secretary released $1,046.82 to Bartels, which amount represented 25% of

Pittman's retroactive benefits, not including interim benefits. Bartels appealed the Court's June 1987 order to the Eighth Circuit Court of Appeals. In Gowen v. Bowen, 855 F.2d 613, 614, 619 (8th Cir. 1988) the Court vacated the order insofar as it denied attorney's fees from interim benefits and remanded, after holding that interim benefits must be treated as past-due benefits. In February 1989, the Secretary authorized Bartels to charge a fee of $1,254.16 for representing Pittman at the administrative level. The Secretary advised Bartels to look to Pittman for payment, since no benefits had been withheld beyond the $1,046.82 released earlier to Bartels.

Bartels responded by filing a motion in the District Court to hold the Secretary in contempt for failure to withhold

the proper amount for attorney's fees, as Pittman was unable and unwilling to pay the balance of the fees he owed. The District Court denied the contempt motion but ordered the Secretary to pay Bartels the balance owing on the court-ordered fee ($735.34), as well as the administrative fee authorized by the Secretary. The Court further directed the Secretary to pursue recoupment of these amounts from Pittman's future disability benefits.

The Secretary appealed the District Court's decision, and the Eighth Circuit agreed with the District Court's determination that under the decision in Gowen v. Bowen, supra, the Secretary erroneously paid Pittman benefits that should have been withheld for payment of attorney's fees to Bartels, which resulted in an overpayment to Pittman. However, the

Court affirmed the District Court's order in Pittman only insofar as it directed the Secretary to pursue recoupment of the balance remaining on its fee award; that unless waiver of recoupment was required, the Secretary must attempt to recoup the amount to the extent the award did not exceed 25% of past-due benefits as defined by Gowen v. Bowen, supra; and any funds recouped were to be paid over to Bartels. The Court held that it was without authority to order payment of the administrative fee.

2. Ziegenhorn: Anthony Bartels, attorney, represented Ziegenhorn on a claim appealing cessation of his disability benefits. Ziegenhorn drew interim benefits while his claim was pending. In October 1986 his benefits were reinstated by the Secretary.

As an attorney's fee, Bartels petitioned for one-fourth of retroactive and interim benefits. In April 1987, the District Court awarded Bartels a fee of $1,015.00, or 25% of past-due benefits, whichever was less. Bartels did not appeal this Order.

In July 1987, the Secretary authorized Bartels to charge $1,618.17 in attorney's fees for work done at the administrative level. Shortly thereafter, the Secretary released to Bartels the $989.67 which was withheld from Ziegenhorn's retroactive benefits, and advised Bartels to look to Ziegenhorn for payment of the balance of his fee.

In December 1988, after attempting without success to collect the remainder of the fee from Ziegenhorn, Bartels filed a motion in District Court to hold the Secretary in contempt for failure to com-

ply with the Court's April 1987 order, claiming that the Secretary had disobeyed the Order by not including interim benefits as part of past-due benefits. The Court denied the contempt motion, stating that its April 1987 order did not require the Secretary to include interim benefits as part of past-due benefits. However, the Court went on to find that Gowen v. Bowen, supra, applied retroactively, and ordered the Secretary to pay Bartels the administrative fee authorized by the Secretary plus the balance remaining on the court-ordered fee ($25.33), or 25% of past-due benefits as defined by Gowen v. Bowen, supra, whichever was less.

The Secretary appealed to the Eighth Circuit Court of Appeals, which held that the District Court did not abuse its discretion in denying Bartels's motion to

hold the Secretary in contempt, but that the District Court erred when it went on to grant Bartels the relief he sought on the ground that Gowen v. Bowen, supra, applied retroactively, because Bartels's effort to obtain retroactive application of Gowen through a contempt preceding constituted an impermissible collateral attack on the Court's April 1987 Order, which had long since become final and unappealable. The District Court's Order in Ziegenhorn was reversed.

REASONS FOR GRANTING THE PETITION

I. THE APPELLATE COURT ERRED IN REFUSING TO ORDER THE SECRETARY OF HEALTH AND HUMAN SERVICES TO TAKE RESPONSIBILITY FOR THE AGENCY'S FAILURE TO COMPLY WITH THE ADMINISTRATIVE FEE WITHHOLDING PROVISIONS OF 42 U.S.C. § 406.

In the consolidated cases of Pittman v. Sullivan, No. 89-2180EA, and Ziegenhorn v. Department of Health & Human

Services, No. 89-2552EA (8th Cir. Aug. 1, 1990), the Eighth Circuit held that it was without authority to direct the Secretary of Health and Human Services to pay the petitioner, Anthony Bartels, a duly authorized administrative fee for representing a Title II social security disability claimant at the administrative level (App. A). 42 U.S.C. § 406(a) provides for the award of administrative fees but does not prescribe the mode of payment. Case authority and Department of Health and Human Services internal regulations indicate, however, that the Secretary is to award administrative fees from past-due benefits withheld from the claimant pending a final determination, POMS § GN 03940.220, or, in those cases where the claimant elects to receive interim benefits, award such fees from interim benefits withheld from the claim-

ant. Gowen v. Bowen, 855 F.2d 613, 618-19 (8th Cir. 1988) (holding that interim benefits must be treated as past-due benefits for attorney's fee purposes).

In this case, the Secretary authorized administrative fee awards but failed to withhold the fees to which the petitioner is entitled from interim benefits payments. The claimant has since spent all interim benefits payments and is unwilling to voluntarily pay the petitioner. Where administrative errors in withholding occur in the context of past-due benefits cases and the attorney cannot recoup the funds, the Social Security Administration pays the fee directly to the attorney and charges an overpayment to the claimant. 42 U.S.C. § 404; 20 C.F.R. § 404.501(a)(8) (1990) (See App. E); POMS § GN 03940.300(A), (C). The Secretary refuses to recoup the funds from the

claimant in this interim benefits case by those means uniquely at the Secretary's disposal, however, leaving the petitioner with no remedy.

It is beyond dispute that pursuant to 42 U.S.C. § 406(a) the petitioner is entitled to the fee authorized by the Secretary; the only question is whether the Department of Health and Human Services is outside the reach of the federal courts when it refuses to pay such benefits due to its own alleged "error." Because there is much confusion among the circuits regarding the proper role of the federal courts on this particular question and with regard to social security attorney fee questions generally, and because important federal questions are here at issue, the petitioner seeks the Supreme Court's guidance by way of this petition for a writ of certiorari.

42 U.S.C. § 406 was enacted to encourage attorney representation of those disabled individuals claiming Title II benefits by assuring that attorneys taking such cases would be paid adequately. Gowen v. Bowen, supra, 855 F.2d at 619; Condon v. Bowen, 853 F.2d 66, 70-71 (2d Cir. 1988); see also Hearings on H.R. 6675 Before the Senate Finance Comm., 89th Cong., 1st Sess. 512-13 (1965). The statute at the same time protects claimants by placing a ceiling on the amount of attorney's fees recoverable for representation at both the administrative and court levels. 42 U.S.C. § 406(a), (b)(1); Gowen v. Bowen, supra, 855 F.2d at 619.

As noted above, the Secretary has the internal mechanisms of overpayment and recoupment for withholding attorney's fees and ultimately paying such fees to

attorneys who have received a fee award. The individual attorney, on the other hand, is severely limited in collection efforts by 42 U.S.C. § 407, which provides:

> [N]one of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Thus where, as here, the claimant no longer has the funds earmarked for attorney's fees but mistakenly paid to the claimant by the Secretary, and is no longer willing to reimburse his attorney, the petitioner has virtually no method of recovery directly against the claimant. Only the Secretary has authority to remedy this situation created by the Social Security Administration's own error.

To adopt the Secretary's argument that the federal courts cannot order the

Secretary to pay the petitioner his duly authorized administrative fees in the face of the Secretary's inaction would fly in the face of the legislative intent underlying the attorney's fee provisions of 42 U.S.C. § 406. As noted above, the overriding goal behind § 406 is to promote adequate legal representation of disabled persons by assuring attorney's fees. The Secretary argues here that his failure to withhold attorney's fees was an alleged "error". This contention is hard to believe in light of the long line of similar cases in which the Secretary "erroneously" failed to withhold attorney's fees for this petitioner. These cases indicate a pattern or policy of refusing to withhold administrative fees rather than an isolated error. See, e.g., Trekas v. Bowen, No. 88-2101EA (8th Cir. May 12, 1989), rehearing denied (8th

Cir. June 9, 1989), cert. denied, 58 U.S.L.W. 3214 (U.S. Oct. 2, 1989) (No. 8802069); Russell v. Sullivan, 887 F.2d 170 (8th Cir.), rehearing denied (1989), cert. denied, 110 S. Ct. 1473 (1990); Perrin v. Sullivan, No. 89-2914EA (8th Cir.) (case presently pending before the Eighth Circuit); Jennings v. Sullivan, No. 89-2913EA (8th Cir.) (same); Oden v. Sullivan, No. 89-2911EA (8th Cir.) (same); Brand v. Sullivan, No. 89-2912EA (8th Cir.) (same). This policy of failing to withhold attorney's fees is not confined to cases arising in the Eighth Circuit. See, e.g., Roberts v. Schweiker, 655 F. Supp. 1105 (D. Del. 1987) (re: Secretary's violation of regulations in failing to retain a percentage of benefits for attorney's fees); Strickland v. Bowen, 669 F. Supp. 1086 (M.D. Ga. 1987) (same).

Even if the Secretary's oversight in this case was an honest error, such an error should not relieve the Secretary of his obligation under 42 U.S.C. § 406 and implementing regulations, particularly in light of the purpose of the statute. To do so would clearly discourage representation of disability claimants in future interim benefits cases. Ordering the Secretary to pay the petitioner his administrative fees would create no particular hardship for the Administration. The Secretary already collects such fees in cases of past-due benefits, then recoups the overpayment to the claimant pursuant to 42 U.S.C. § 404 and 20 C.F.R. § 404.501(a)(8) (See App. E). The mechanism is therefore in place within the Administration to remedy the petitioner's situation; the Secretary is simply being asked to use that mechanism. The same

concerns which lead the courts to treat interim benefits as past-due benefits for purposes of setting an attorney's fee award should likewise guide the procedures for payment of those fees. Otherwise, the law establishing an attorney's right to such fees would be rendered meaningless.

The Secretary's position that he is not required to pay the petitioner and that he cannot be ordered by the federal court to do so must not only be rejected for those equitable reasons noted above. The law also provides judicial oversight in those cases where the Secretary exceeds his discretion and violates the law. As noted in Condon v. Bowen, supra, 853 F.2d at 72, quoting Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979), the deference generally accorded the Secretary "'is constrained by

[the court's] obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.' . . . It is for the courts, not the administrative agency, to decide conclusively questions of statutory construction." Thus, to the extent that the Secretary's failure to provide payment in this case is based on his erroneous reading of the law, the federal courts must become involved.

Furthermore, as this Court noted in Morton v. Ruiz, 415 U.S. 199, 232 (1974),

> [the] agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, . . . but also to employ procedures that conform to the law.

(Citations omitted.) As similarly explained in Garcia v. Neagle, 660 F.2d 983, 988 (4th Cir. 1981), cert. denied,

454 U.S. 1153 (1982),

> even where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations. . . . Where the controlling statute indicates that particular agency action is committed to agency discretion, a court may review the action if there is a claim that the agency has violated constitutional, statutory, regulatory or other restrictions, but may not review agency action where the challenge is only to the decision itself.

See also Thomason v. Schweiker, 692 F.2d 333, 336 (4th Cir. 1982) (following Garcia v. Neagle, supra).

In light of these authorities, the Secretary's contention that 42 U.S.C. § 406(a) gives the Administration absolute discretion and sole authority over administrative fee decisions, and thus removes such decisions from federal court scrutiny is without merit. The amount of

the Secretary's award is not being challenged here. Rather, the petitioner seeks an order demanding that the Secretary comply with the letter and spirit of the attorney fee provisions of the statute, regulations, and internal operating procedures, and actually pay him the award which has been duly authorized for his representation of the disability claimants identified above.

The question of the respective roles of the Social Security Administration and the federal courts in carrying out the attorney fee provisions of Title II on these and similar facts is the subject of much dispute among the circuits. In Webb v. Richardson, 472 F.2d 529 (6th Cir. 1972), for example, the court held that it was completely appropriate for the court not only to award attorney's fees for representation before the court on

behalf of a social security claimant, but to set an administrative award as well. The court adopted this approach for the sake of clarity and more adequately to carry out the purpose of the 25% statutory cap on all fees, both judicial and administrative, among other reasons. Id. at 536-37.

Other circuits, including the Eighth Circuit in the consolidated cases at bar, have applied the statute in a mechanistic fashion to reach a contrary result. See, e.g., McGuire v. Sullivan, 873 F.2d 974 (7th Cir. 1989) (court without jurisdiction to award fee for services at administrative level); Guido v. Schweiker, 775 F.2d 107, 109 (3d Cir. 1985) (same); Whitt v. Califano, 601 F.2d 160, 161-62 (4th Cir. 1979) (same); McDonald v. Weinberger, 512 F.2d 144, 146 (9th Cir. 1975) (same); Fenix v. Finch, 436 F.2d 831, 838

(8th Cir. 1971) (same); Gardner v. Mendez, 373 F.2d 488, 490 (1st Cir. 1967) (same).

Unlike those cases noted above, the Secretary has already set an administrative award for the petitioner in this case; the only question is whether the federal court should be allowed to order the actual payment of that award where the Secretary is refusing payment due to the Administration's error in failing to withhold those funds from the claimant. Nonetheless, the larger issue of the appropriate role of the federal courts in deciding issues related to administrative fees is once again presented by the facts of this case, similarly to the foregoing authorities. If the circuits were to follow the common-sense approach reflected by the Sixth Circuit's decision in Webb v. Richardson, supra, there would

be no question that the court could become involved in this dispute.

The question of the courts' role in administrative fee disputes has also arisen on facts more closely akin to this case. In Russell v. Sullivan, supra, the Eighth Circuit declined to order payment of an attorney's administrative fee by the Secretary on the basis that because the court is without jurisdiction to review the Secretary's fee awards, it likewise has no authority to enforce an award issued by the Secretary. 887 F.2d at 171. Russell contradicts Morton v. Ruiz, supra, and Garcia v. Neagle, supra, both of which support judicial review not of the amount of an administrative award itself, but of the procedures used to carry out that award where the Secretary fails to comply with the law. Russell is also in conflict with Motley v. Heckler, 605

F. Supp. 88 (W.D. Va. 1985), rev'd on other grounds, 800 F.2d 1253 (4th Cir. 1986), in which the court upheld the Social Security Administration's practice of paying a fee directly to an attorney where it failed to withhold the proper amount from the claimant, and then charging the fee to the claimant as an overpayment against the claimant's benefits, in the context of a Title XVI case.

In Bowen v. Galbreath, 485 U.S. 74 (1988), this Court held that the federal courts have no authority to order the Secretary to withhold attorney's fees from past-due benefits in Title XVI cases. However, the Court's clear distinction between Title XVI and Title II implied that such orders are completely appropriate in Title II cases. This case presents the Court with a unique opportunity to clarify the law and diffuse at

least a portion of the rampant confusion and conflict which now prevails in Title II attorney's fees cases in the circuit courts. Without the Court's guidance, some circuit courts will continue to deny attorneys the fees--particularly for administrative representation--to which they are entitled by law and thus ultimately discourage legal representation of disability claimants. To avoid this inequitable result, this petition for a writ of certiorari should be granted.

II. THE APPELLATE COURT FAILED TO APPLY THE PROPER STANDARD IN RULING ON THE PETITIONER'S REQUEST FOR RETROACTIVE APPLICATION OF GOWEN V. BOWEN.

In Ziegenhorn v. Department of Health & Human Services, supra, the Eighth Circuit specifically declined to apply Gowen v. Bowen, supra, retroactively in response to the petitioner's con-

tempt claim and thereby prevented the petitioner from obtaining the only relief available to him. The Eighth Circuit reasoned that seeking retroactive application of Gowen v. Bowen, supra, by way of a contempt proceeding constituted an impermissible collateral attack on the Court's April 1987 order, which had long since become final and unappealable (App. A). For the reasons which follow, the Court's analysis was erroneous.

In Ex parte Robinson, 86 U.S. (19 Wall.) 505 (1874), quoted in 11 C. Wright & A. Miller, Federal Practice and Procedure § 2960 at 581-82 (2d ed. 1973), the Supreme Court said:

> The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts and, consequently, to the due administration of justice. The moment the courts

> of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

The power of federal courts to punish by contempt is now codified at 18 U.S.C. § 401. Pursuant to that statute, disobedience to a "lawful writ, process, order, rule, decree, or command" is grounds for exercising the court's contempt power. 18 U.S.C. § 401(3).

Given the breadth of the court's contempt power, the Eighth Circuit erred by characterizing the petitioner's contempt claim as an impermissible collateral attack (App. A). The Court obviously had the power to hold the Secretary in contempt. In this case, where virtually no other remedy was available, the case for contempt was unusually compelling.

Even if the Eighth Circuit was correct in finding that contempt was an inappropriate vehicle for applying Gowen v. Bowen, supra, retroactively, the Court had the power to fashion an equitable remedy and thereby afford the petitioner with his duly authorized administrative fees. The contempt power of the court does not limit the court's discretion to fashion an equitable remedy. Smith v. Bonds, 813 F.2d 1299, 1303 (4th Cir.), cert. denied, 488 U.S. 868 (1987). The court need not choose between contempt or nothing. Alexander v. Hill, 707 F.2d 780, 783 (4th Cir.), cert. denied, 464 U.S. 874 (1983); see also Berger v. Heckler, 771 F.2d 1556, 1569 (2d Cir. 1985). Thus, in Alexander v. Hill, supra, where the plaintiff filed a motion seeking to hold state welfare officials in contempt for failing to timely imple-

ment a plan for processing ADC and Medicaid applications, the court held that the district court had the authority to impose remedial fines or penalties, despite the fact that there had been no finding of contempt or bad faith.

In this case, the Secretary refuses to pay the petitioner those administrative fees to which he is legally entitled. The federal courts provide the only avenue for challenging the Secretary's intransigence and consequently provide the only avenue for giving meaning to 42 U.S.C. § 406 and its implementing regulations. The Eighth Circuit grievously erred by failing to remedy the unjust and illegal situation created by the Secretary's refusal to comply with the law. Because fundamental federal issues concerning the proper role of the federal courts are here at issue,

the Court should grant this petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ORIGINAL SIGNED BY

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November 29, 1990.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2180EA

Louie Pittman, Appellee,

v.

Louis W. Sullivan, M.D.,
Secretary of Health and Human Services,
Appellant

No. 89-2552EA

Wayne E. Ziegenhorn, Appellee,

v.

Department of Health and
Human Services, Appellant.

Appeals from the United States District Court for the Eastern District of Arkansas

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Submitted: April 12, 1990
Filed: August 1, 1990

Before MAGILL, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BEAM, Circuit Judge.

MAGILL, Circuit Judgment.

In these consolidated appeals, the Secretary of Health and Human Services seeks reversal of the district court's orders requiring him to make additional attorney's fee payments to Anthony Bartels, the attorney who represented claimants Wayne Ziegenhorn and Louie Pittman in administrative and judicial proceedings concerning the termination of their disability insurance benefits. When their cases were remanded for further administrative proceedings following enactment of the Social Security Disability Benefits Reform Act of 1984, both Ziegenhorn and Pittman elected to receive interim benefits under 42 U.S.C. § 423 (g), which permits claimants to continue receiving disability benefit payments pending administrative review of the termination decision. The Secretary

ultimately reinstated both claimants' disability benefits. Bartels then petitioned the district court for attorney's fee awards in the two cases. Under 42 U.S.C. § 406 (b) (1), such awards are paid out of and may not exceed twenty-five percent of past-due benefits. In both cases, the Secretary did not include interim benefits as part of past-due benefits in calculating the amount to be withheld for payment of authorized attorney's fees.

This court subsequently held in Gowen v. Bowen, 855 F. 2d 613, 618-19 (8th Cir. 1988), that interim benefits must be included as part of past-due benefits in determining allowable attorney's fees under § 406. After the Gowen decision, Bartels filed motions in the district court to hold the Secretary in contempt for failing to pay the balances remaining on the court's fee awards for his representation of Ziegenhorn and Pittman,

and the fees authorized by the Secretary in the two cases. The district court denied the contempt motions, but in each case it went on to order the Secretary to make additional fee payments to Bartels out of general social security funds. We reverse the district court's order in the Ziegenhorn case, and affirm in part the court's order in the Pittman case.

I.

The Secretary reinstated Ziegenhorn's disability benefits in October 1986. Excluding interim benefits, Ziegenhorn's past-due benefits total $3,958.70. The Secretary withheld twenty-five percent of this amount, $989.67, for payment of authorized attorney's fees. In an April 1987 order, the district court awarded Bartels a fee of $1,015 or twenty-five percent of Ziegenhorn's past-due benefits, whichever was less, for his representation of Ziegenhorn at the district court level. Bartels did not appeal this order. In

July 1987, the Secretary authorized Bartels to charge $1,618.17 in attorney's fees for his services at the administrative level. Shortly thereafter, the Secretary released to Bartels the $989.67 withheld from Ziegenhorn's past-due benefits. The Secretary advised Bartels that he would have to look to Ziegenhorn for the remainder of his fees.

In December 1988, almost four months after Gowen was decided, Bartels filed a motion in the district court to hold the Secretary in contempt for failure to comply with the court's April 1987 order awarding fees. Bartels claimed that the Secretary had disobeyed the order by not including interim benefits as part of past-due benefits. The motion also stated that Ziegenhorn had refused to pay the balance of the fees owed. Because of its April 1987 order did not require the Secretary to include interim benefits as part of the past-due benefits, the court

denied the contempt motion. However, the court went on to find that Gowen applies retroactively. On that basis, the court ordered the Secretary to pay Bartels the administrative fee authorized by the Secretary plus the balance remaining on the court-ordered fee ($25.33), or twenty-five percent of Ziegenhorn's past-due benefits as defined by Gowen, whichever amount was less. The court stated that it was up to the Secretary to decide whether to seek recoupment from Ziegenhorn.

Pittman's disability benefits were reinstated in October 1986. In a June 1987 order, the district court awarded Bartels a fee of $1,782.16 or twenty-five percent of Pittman's past-due benefits, whichever was less, for representing Pittman at the district court level. The order expressly held that past-due benefits do not include interim benefits. In July 1987, the Secretary released

$1,046.82 to Bartels. This amount represented twenty-five percent of Pittman's past-due benefits, not including interim benefits. Bartels then appealed the court's June 1987 order to this court. In Gowen, 855 F. 2d at 614, 619, we vacated the order insofar as it denied attorney's fees from interim benefits, and remanded. Thereafter, in February 1989, the Secretary authorized Bartels to charge a fee of $1,254.16 for representing Pittman at the administrative level. The Secretary advised Bartels that he would have to look to Pittman for payment because no benefits had been withheld beyond the $1,046.82 previously released to Bartels.

Bartels responded by filing a motion in the district court to hold the Secretary in contempt. The motion stated that Pittman was unable and unwilling to pay the balance of the fees he owed. The court denied the contempt motion, but

ordered the Secretary to pay Bartels the balance owing on the court-ordered fee ($735.34), as well as the administrative fee authorized by the Secretary. The court further directed the Secretary to pursue recoupment of these amounts from Pittman's future disability benefits.

II. ZIEGENHORN

The district court did not abuse its discretion in denying Bartels' motion to hold the Secretary in contempt for failure to comply with the court's April 1987 order awarding attorney's fees. It is clear that "the Secretary fully complied with the express terms and intent of the order." Davis v. Bowen, 894 F. 2d 271, 273 (8th Cir. 1989)(per curiam), cert. denied, 110 S. Ct. 1922 (1990).

The district court erred, however, when it went on to grant Bartels the relief he sought on the ground that Gowen applies retroactively. Bartels' effort to obtain retroactive application of Gowen

through a contempt proceeding constituted an impermissible collateral attack on the court's April 1987 order, which had long since become final and unappealable. It is well settled that "'a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed.'" United States v. Rylander, 460 U.S. 752, 756 (1983) (quoting Maggio v. Zeitz, 333 U.S. 56, 69 (1984)). This rule is based on the doctrine of res judicata. See United States ex rel. Shell Oil Co. v. Barco Corp., 430 F. 2d 998, 1001 (8th Cir. 1970); Daly v. United States, 393 F. 2d 873, 876 (8th Cir. 1968). As the Third Circuit has observed, "any other rule would set to nought the time limits for seeking appellate review set forth in Fed. R. App. P. 4 (a)." United States v. Millstone Enters., Inc., 864 F. 2d 21, 23 (3d Cir. 1988). We believe that the res judicata rationale

for the rule prohibiting a collateral attack on the underlying court order in a contempt proceeding applies with even greater force in the unusual situation where the movant is the party making the attack.

This result is consistent with our decisions in Davis and Russell v. Sullivan, 887 F. 2d 170 (8th Cir. 1989) (per curiam), cert. denied, 110 S. Ct. 1473 (1990). In both of these cases, the district court denied similar contempt motions by Bartels without going on to order relief based upon retroactive application of Gowen. In affirming the denials, we refused to address Bartels' argument that Gowen should be applied retroactively. Russell, 887 F. 2d at 172 (declining to address argument on ground that only issue before the panel was Bartels' contempt motion); Davis, 894 F. 2d at 273 (emphasizing that argument was inherently inconsistent with Bartels'

contempt motion alleging the Secretary had disobeyed the underlying order awarding fees).

III. PITTMAN

The district court properly declined to hold the Secretary in contempt in the Pittman case. Bartels does not contend otherwise. Because the matter was on remand from this court, see Gowen, 855 F. 2d at 614, the Secretary concedes that Bartels' request for relief did not constitute a collateral attack. The question is to what extent the remedy ordered by the court was permissible.

The matter of attorneys' fees for services performed at the administrative level is committed by § 406 (b) (1) to the responsibility of the Secretary exclusively, and such fees may not be awarded by the courts. Id. at 618 (citing Fenix v. Finch, 436 F. 2d 831, 838 (8th Cir. 1971)). Furthermore, fee awards made by the Secretary are not subject to

judicial review. Copaken v. Secretary of Health, Educ. & Welfare, 590 F. 2d 729, 731 (8th Cir. 1979)(per curiam). Because "the Secretary's fee awards are not judicially reviewable, the district court likewise has no authority to force the Secretary to comply with an award the court did not issue." Russell, 887 F. 2d at 171. Therefore, the district court had no authority to order the Secretary to pay Bartels the authorized administrative fee, or to direct the Secretary to recoup that amount from Pittman and pay it over to Bartels.[1]

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[1]In deciding this and the following issue, we do not consider whether a different result might be required if Bartels had raised a constitutional claim.

We must also conclude that the court had no authority to order the Secretary to pay Bartels the balance remaining on its fee award out of general social security funds. "The United States is not liable for such a payment absent a specific waiver of sovereign immunity." Id. at 172 (citing Ruckelshaus v. Sierra Club, 463 U. S. 680, 685 (1983)). Section 406 "cannot be construed as a waiver of immunity" because it "contemplates payment of the fee award by the claimant, out of past-due benefits, rather than by the government, out of general funds." Id (emphasis in original).[2] Although it was

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[2]Two district court decisions have ordered the Secretary to make additional fee payments to an attorney because the Secretary failed to withhold benefits that should have gone to the attorney as payment for fees. Kovar v. Heckler, 622 F. Supp. 88, 93-94 (W.D. Va. 1985), rev'd on other grounds, 800 F. 2d 1253 (4th Cir. 1986); see also Clay v. Secretary of Health & Human Servs., 823 F. 2d 679, 684 (1st Cir. 1987) (agreeing with district court's determination that "the Secretary can either recoup such funds from the

state [to which they were paid as reimbursement] or bear the burden of recovering the attorney's fees from the claimant for payment to counsel"). The courts in Kovar and Motley did not discuss whether the federal government's sovereign immunity would be violated if the Secretary effectively ended up paying the additional fees out of general funds because he was unable to recoup the overpayment from the claimant's future benefits.

not addressed by the parties, we are aware that the Social Security Administration's Programs Operating Manual System provides that if past-due benefits are mistakenly released to the claimant rather than his attorney, and the attorney is unable to collect the fee that was to be paid out of those benefits, then the Administration will pay the fee directly to the attorney and attempt to recoup that amount from the claimant. We are constrained, however, by the principle that "administrative regulations cannot waive the federal government's sovereign immunity." Mitzelfelt v. Department of Air Force, 903 F. 2d 1293, ___ (10th Cir. 1990) (citing United States v. Mitchell, 463 U. S. 206, 215-16 (1983)); see also United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 660 (1947) (agency officials "possess no power through their actions to waive an immunity of the United States").

We agree with the district court's

determination that under our decision in Gowen, the Secretary erroneously paid Pittman benefits that should have been withheld for payment of attorney's fees to Bartels. This resulted in an overpayment to Pittman. 42 U.S.C. § 404 (a) (1) (A) states that the Secretary "shall" recoup overpayments made to a claimant. This language "mandates" recoupment of overpayments. Sullivan v. Everhart, 110 S. Ct. 960, 965 (1990). The Secretary's regulations specifically provide that § 404's provision for recoupment "apply in cases where through error . . . [a] payment of past due benefits is made to an individual and such payment had not been reduced by the amount of attorney's fees payable directly to an attorney under [§406]." 20 C.F.R. § 404.501 (a) (8). Accordingly we find that the district court did not err in directing the Secretary to pursue recoupment of the balance remaining on its fee award.

Section 404 (b) provides that the Secretary must waive recoupment if (1) the claimant is without fault, and (2) recoupment would either defeat the purpose of the Social Security Act or be against equity and good conscience. See also 20 C.F.R. §404.506. Benefit recipients are entitled to a prerecoupment oral hearing if they request waiver under § 404 (b). Califano v. Yamasaki, 442 U.S. 682, 695-97 (1979). We recognize the very real possibility that the Secretary will be required to waive recoupment in this case. The parties in no way suggest that Pittman was at fault for the overpayment, and we have previously indicated that the phrase "against equity and good conscience" is not to be narrowly construed. See Groseclose v. Bowen, 809 F. 2d 502, 505-06 (8th Cir. 1987); see also 20 C.F.R. § 404.508 (a)(recoupment defeats the purpose of the Act if it would "deprive a person of income required for ordinary and

necessary living expenses").[3] As this case illustrates, recoupment is an uncertain, drawn-out, and cumbersome method of collecting unpaid attorney's fees. However, the need to resort to this procedure should arise less often in the future given our conclusion that Gowen requires the Secretary to withhold twenty-five percent of interim benefits for payment of possible fee awards. In addition, if the claimant agrees, an

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[3]Bartels himself may not attempt to intercept Pittman's future disability benefits because they are not "subject to execution, levy, attachment, garnishment, or other legal process." 42 U.S.C. § 407 (a).

attorney can guard against erroneous disbursements of past-due benefits by setting up an escrow account for payment of possible attorney's fees. See Condon v. Bowen, 853 F. 2d 66, 72-73 (2d Cir. 1988). The Secretary has expressly authorized the use of such accounts. Social Security Ruling 82-39.

The Secretary does not dispute that he is obligated to seek recoupment in cases of overpayment. Rather, he argues that there was no overpayment in the Pittman case because Gowen's holding that past-due benefits include interim benefits applies only to the calculation of allowable attorney's fees under § 406, not to the payment of those fees. The Secretary emphasizes his contention that the withholding of twenty-five percent of interim benefits for payment of possible fee awards would result in hardship to

claimants.[4] We agree with the Second

[4]The Secretary also argues that there is no statutory basis for such withholding because the language of § 406 permits the withholding of past-due benefits only if the Secretary has made a determination favorable to the claimant or a district court has entered judgment for the claimant. By definition, interim benefits are paid prior to any such determination or judgment. See § 423 (g) (1). We view the Secretary's interpretation of § 406 as overly mechanical, and no different in substance than the one rejected in Gowen, 855 F. 2d at 619. See also Shoemaker v. Bowen, 853 F. 2d 858, 861 (11th Cir. 1988) (rejecting Secretary's argument that "because interim benefits are paid prior to the reinstatement of benefits they are not 'past-due benefits,'" and holding that interim benefits are past-due benefits under § 406). Although the Secretary's interpretation of the statute is entitled to considerable deference, we need not accept it where, as here, it is unreasonably narrow and frustrates the statute's purpose. See Groseclose, 809 F. 2d at 505-06.

Circuit that

> claimants would actually suffer much greater hardship if they were not able to secure competent counsel to represent them in their appeals because of the extremely low fees to which their attorneys would be consigned under the Secretary's position, rather than if they received seventy-five percent of the benefits during the appeal process instead of one hundred percent.

Condon v. Bowen, 853 F. 2d at 71 (going on to hold that interim benefits are part of past-due benefits within the meaning of § 406). Restricting Gowen to the confines urged by the Secretary would render our decision in that case all but meaningless because in most cases the attorney's only realistic source of payment for a fee award is withheld benefits. Not including interim benefits in this source would create a disincentive for attorneys to represent claimants who elect to receive interim benefits, which in turn would lead claimants "to forego the relief intended by Congress to retain competent legal

representation." Gowen, 855 F. 2d at 619.[5] Our representation in Gowen was based on the purpose of § 406, which is to "'promote the adequate representation of potentially disabled individuals through a reasonable attorney's fee while at the same time preventing too great a reduction in a claimant's already inadequate stipend in the event he is declared disabled.'" Id. (quoting Santos Rivera v. Secretary of Health & Human Servs. 674 F. Supp. 963, 965 (D.P.R. 197)). We decline to undermine this purpose and subvert the effect of Gowen by limiting to fee calculation its holding that interim benefits are past-due benefits under § 406.

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[5]Indeed, attorneys could be placed in the conflict-ridden position of advising clients not to apply for sorely needed interim benefits. See Condon, 853 F. 2d at 71.

IV.

For the reasons stated above, the district court's order in the Ziegenhorn case is reversed. We affirm the court's order in the Pittman case only insofar as it directs the Secretary to pursue recoupment of the balance remaining on its fee award. Unless waiver of recoupment is required, the Secretary must attempt to recoup this amount to the extent the award does not exceed twenty-five percent of Pittman's past-due benefits as defined by Gowen. The funds recouped must be paid over to Bartels.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

Civil No. J-C-84-114

LOUIE V. PITTMAN, PLAINTIFF

V.

SECRETARY OF HHS, DEFENDANT

[FILED APRIL 5, 1989]

ORDER

This case is before the Court on remand from the Eighth Circuit Court of Appeals for recalculation of the amount of fees due plaintiff's counsel. Pittman v. Bowen, Case No. 87-1995 (8th Cir. August 31, 1988). The Court of Appeals reversed the Secretary and this Court and concluded that interim benefits should be included in the "past due benefits" against which maximum attorney's fees are calculated. See 42 U.S.C. 406 (b) (1). Plaintiff's

counsel has moved to hold the Secretary in contempt for his refusal to pay counsel any additional amount, and the Secretary has responded by claiming that counsel should look to his client for the balance due.*

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*Counsel claims that the amount now owed to him is $1989.572 [sic] which includes an uncollected $735.34 awarded to him by this Court for proceedings before it as well as an uncollected $1,254.16 awarded by the Secretary for counsel's representation during administrative proceedings. See 42 U.S. C. 406 (a) and (b). The Secretary at one point seems to suggest that the only additional amount collectible is the $735.34 awarded by this Court. See Defendant's Response, at 4; but see id., at 5-6, acknowledging that "the attorney was authorized to charge $3,036.32," which would include the administrative award. The Court is unclear as to how much the Secretary believes counsel may now collect, and will give the Secretary an opportunity to make his views known.

If interim benefits were excluded from the definition of past due benefits, the ceiling on counsel's award would have been $1,046.82. This was the amount the Secretary withheld and paid over pursuant to this Court's now-reversed Order and consistently with the Secretary's pre-Pittman understanding of the statute. When interim benefits are included, the ceiling is increased to $3,226.05. The Secretary concedes that counsel is entitled to collect more money (though it is not clear how much, see footnote supra), but claims that plaintiff is the proper source from which to recover. Defendant's Response, at 6. Counsel contends that the Secretary should pay counsel and then recoup from the plaintiff by withholding future amounts as authorized by 42 U.S.C. 404 (a) (1). Counsel further contends that the Secretary's failure to make payment to him is contemptuous.

First of all, the Court will not hold the Secretary in contempt because the issues involved here are the subject of fair dispute and the applicable law is uncertain. There is no evidence of willful disobedience to court orders.

On the other hand, the Court finds that counsel is correct in contending that the Secretary should pay him the additional amount which he may collect under the Eighth Circuit decision in Pittman. The Court of Appeals held that counsel was entitled to have up to 25% of the total award to plaintiff withheld pursuant to section 406 (b) (1). The Secretary did not withhold the appropriate amount, but instead dispersed the funds to the plaintiff. The fact that both the Secretary and this Court misread the applicable statutory provisions may make the Secretary's conduct non-contemptuous, but it does not make it legally correct. In plain language, counsel was entitled to

his full reasonable fee up to 25% of the award. The Secretary paid the money to the wrong party, the plaintiff, and must now make payment to the attorney and recoup the overpayment.

The Secretary points to Condon v. Bowen, 853 F. 2d 66, 72-3 (2d Cir. 1988), for the proposition that the Social Security Administration is not a "collection agency for the Social Security bar," but the Secretary's reading of that language seems too broad and the actual holding of the case does not reach the question of whether the Secretary is required to pay and recoup mistaken attorney's fees underpayments. It is perfectly obvious that the Social Security Administration does fulfill a collection agency-like function under section 406 (b), withholding funds from the award and forwarding them to the plaintiff's attorney. Whatever "practical difficulties" are attendant upon requiring

the Secretary to comply with the statutory mandate are, first of all, largely of the Secretary's own making, and second of all, likely matched by the practical difficulties facing an attorney trying to recover money from his destitute client.

On that last head, the difficulty of forcing the counsel to chase his client for his rightful fees, it is worth noting that the Social Security Act contains an extremely broad exemption from collection for benefits. Section 207 of the Act, 42 U.S.C. 407, provides that "none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." It is difficult to see how counsel is to collect his fees, given his representation that his client has no money.

In short, the Court's earlier

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

conclusion that interim benefits should not be included in the amount of past due benefits from which counsel's fee could be taken was an erroneous interpretation of the law, the Secretary's payment of moneys owed to counsel was likewise contrary to the statute, and the receipt of those funds was a windfall to the plaintiff. The matter may be made right by the Secretary paying counsel the additional funds owed and recouping the amount overpaid to plaintiff.

The justness of this result is reinforced by the nature of interim benefits. These benefits are paid to a claimant subject to the Secretary's right of recoupment should the recipient ultimately be found not entitled to them. 42 U.S.C. 423 (g) (2) (A). The final result on the merits in this case is that plaintiff is not entitled to keep the interim benefits paid him, but he is not entitled to that portion which represents

counsel's reasonable fees. Plaintiff received interim fees provisionally, subject to a decision as to the precise amount which he was owed. That amount has now been determined, and it is not unjust to require the plaintiff to repay the overpayment.

IT IS THEREFORE ORDERED that plaintiff's motion to hold the Secretary in contempt be, and it is hereby, DENIED. The Secretary is ordered to forthwith pay counsel the amount of additional fees owed to him under the Court of Appeals decision in Pittman v. Bowen, Case No. 87-1995 (8th Cir. August 31, 1988). If the Secretary contends that the balance owed is other than $1,989.57 (representing the combined additional amount collectible under this Court's award and the Secretary's administrative award), the Secretary shall state the basis for that contention within 15 days of this Order. Counsel may respond to the Secretary's position within

11 days after it is filed. The Secretary may recover the additional amount paid to counsel from plaintiff.

Dated this 4th day of April, 1989.

/s/Garnett Thomas Eisele
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

Civil No. J-C-84-113

WAYNE E. ZIEGENHORN, PLAINTIFF

V.

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES

[FILED MARCH 29, 1989]

ORDER

Plaintiff commenced this suit seeking review of the Secretary's decision to deny Social Security benefits. On December 17, 1986 the court granted the Secretary's motion to remand for further administrative proceedings to award plaintiff benefits. Plaintiff's attorney, Mr. Anthony W. Bartels, subsequently petitioned the Court for attorney's fees pursuant to §206 (b) of the Social Security Act, 42 U.S. C. §406 (b) (1),

which provides that whenever a court renders judgment favorable to the claimant, the court may allow reasonable attorney fees, "not in excess of 25 percent of the total of the past due benefits to Section 406 (b) provides that the Secretary may certify and withold attorney fees from the claimants [sic] past due benefits award so long as these fees do not exceed twenty-five percent of the past due benefits. Id. The Court found Mr. Bartels was entitled to fees in the amount of $1,000 and $15 in costs for his representation of the claimant at the district court level. Order of April 16, 1987 at 2. At the same time, the Court noted it could not award similar fees for representation of the claimant at the administrative level, and left it to the Secretary to "coordinate any fees granted for such representation with the amount granted by the Court so that the maximum allowed fee will not exceed twenty-five

percent of the plaintiff's past-due benefits. Id at 2-3.

According to Mr. Bartels, the Social Security Administration approved attorney fees in the amount of $1,678.17 for his work at the administrative level. This fee, along with the Court's own award amounted to a total $2,693.17. Mr. Bartels also contends that this sum equals twenty-five percent of the claimant's past due benefits, and is the total amount to which he is entitled pursuant to the court's order of April 16th.

On August 10, 1987, the Secretary released to Mr. Bartels only $989.67 representing the Secretary's calculations of the amount subject to witholding from the plaintiff's past-due benefits. Mr. Bartels contends that he is still owed $1,703.50, and has been unable to recover this sum from the claimant. He now moves to have this Court hold the Secretary in contempt for failure to comply with the

Court's April 16, 1987 order.

The Secretary states at the time of the payment it was the agency's policy to exclude interim benefits paid to the plaintiff during the pendency of his appeal from the definition of past-due benefits. Consequently, interim benefits were not included in "the total amount of benefits payable under Title II of the Act to all beneficiaries" when the Secretary calculated the twenty-five percent allowable amount in attorney fees. 20 C.F.R. § 404.1703. Last year, this practice was rejected by the United States Court of Appeals for the Eighth Circuit which held that the Secretary must include interim benefits in the calculation of attorney fees. Gowen v. Bowen, 855 F. 2d 613 (1988). The Secretary argues that Gowen should not be given retrospective effect.

Contempt

To begin with, the Court will deny

the motion to hold the Secretary in contempt. As Mr. Bartels points out in his brief, civil contempt is an act by one party to a suit in disobedience to an order in behalf of another party. Besset v. W. B. Conky Co., 194 U.S. 324 (1904). Contempt is appropriate where it has been shown by clear and convincing evidence that a person refused to do what he was ordered to do. Gompers v. Bucks Stove and Range Co., 221 U.S. 418, 449 (1910). In this case, the order of April 16, 1987 was silent on the question of how the Secretary was to calculate attorney fees from the claimant's past due benefits. Furthermore, as Mr. Bartels is aware, it had been previously the opinion of this court that interim benefits could be excluded from attorney fee calculations. Gowen v. Heckler, No. J-C-83-386 (E. D. Ark. June 6, 1986) rev'd. in part sub nom. Gowen v. Bowen, supra. Therefore, it cannot be said that the Secretary

consciously or otherwise disobeyed any order of this court.

Nonretroactivity

The issue presented in this case is whether Gowen should be applied retrospectively. In Chevron Oil Co. v. Hunson, 404 U.S. 97 (1971), the Supreme Court summarized the analytic framework to be used in determining whether a decision should be denied retroactive application:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied retroactively must establish a new principal of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose result was not clearly forshadowed . . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-7 (citations omitted).

Although the analysis must obviously proceed one step at a time, a final determination involves pulling together the three factors for a careful balancing. Cash v. Califano, 621 F. 2d 626, 629 (4th Cir. 1980). Thus, the final factor of substantial inequity is closely tied with a finding of initial reliance. Without some reliance there can be no basis of inequity. Id. Similarly, the mere fact that a retroactive application would not advance the policy of the recently discovered law "will not in itself preclude retroactivity, unless application of the rule would produce an inequitable result. Id.

The Secretary argues that Gowen announced a new, unanticipated principle of law not "clearly foreshadowed" by legal precedent. In those cases involving retrospective application of new interpretations of law, it is clear that

the focus has been upon the reasonableness of the prior interpretation. For example, in Allen v. State Board of Elections, 393 U. S. §44 (1969) the Court was presented with the question of interpreting the application of § 5 of the Civil Rights Act of 1965. The section provided that if a state covered by the act passed any law changing voting qualifications, standards or procedures, such laws would have no effect unless the state first obtained a favorable declaratory judgment in the United States District Court for the District of Columbia. Id. at 548-49. The State of Mississippi sought to enforce certain election law amendments without obtaining declaratory judgments. The state argued that each case involved a change in rules relating to the qualification of candidates and methods of election or appointment to office, while the language of § 5 of the Act only referred to changes affecting an

individual's right to register and vote in an election. Id. at 550-51.

The Court disagreed and held the provision of § 5 applicable to the Mississippi amendments. But it also declined to give the ruling retrospecitve [sic] effect by ordering new elections finding that the question of the application of § 5 involved "complex issues of first impression" in which it was never shown that the amendments contravened the underlying purpose of the Act. Thus the state could reasonably conclude that the amendments were exempt from the provision of section 5. Id at 571-72.

Similarly in Cash v. Califano, supra, the question before the Court was whether to deny retroactive application of the Supreme Court's earlier decision in Califano v. Goldfarm, 430 U. S. 199 91977), which invalidated a statute requiring widowers to prove dependence

upon their deceased spouse before becoming eligible for Social Security benefits while at the same time exempting widows from having to make a similar showing. The court in Cash noted that in the years prior to Goldfarb the Supreme Court had invalidated a number of similar gender-based benefits statutes. Given this trend, the court concluded that the "Secretary cannot have been surprised by the result in Goldfarb." Cash v. Califano, supra, 621 F. 2d at 630.

The essence of these cases is that reasonable parties will not be held to foreknowledge of the result in a case of first impression. Thus, the question must be whether the Secretary was reasonable in concluding prior to Gowen that interim benefits should be excluded from attorney fee calculations. The Secretary argues that since this practice had never been challeneged [sic] before, there was no way to predict a new interpretation would be

discovered. The reasonableness of this position, the government contends, is evidenced by the decision in Rodriguez v. Secretary of HHS, 856 F. 2d 338 (1st Cir. 1988) upholding the Secretary's interpretation of past-due benefits.

There is no doubt that opinions vary among the courts on whether interim benefits should have been used in calculating attorney fees. The only other appellate courts to have addressed this question also rejected the Secretary's position. Condon v. Bowen, 853 F. 2d 66 (2d Cir. 1988); Shoemaker v. Bowen, 853 F. 2d 858 (11th Cir. 1988). Prior to that, the district courts disagreed on the correct interpretation of past-due benefits. See Pittman v. Bowen, No. J-C-84-114, slip op. (E. D. Ark. 1987) and Hewett v. Bowen, No. 584-Civ.-040, slip op. (S. D. Ga. 1987) (agreeing with the Secretary). Santos Rivera v. Secretary of Health and Human Services, 674 F. Supp.

963 (D. P. R. 1987) and Shoemaker v. Bowen, No. CV 84-PT-0486-S, slip op. (N. D. Ala. 1987) aff'd 853 F. 2d 858 (disagreeing with the Secretary).

About the most that can be said then of the prior precedent on whether interim benefits should be considered past-due benefits for the purpose of computing attorney fees is that it generated mixed reactions at the district court level, and that for the moment, the Secretary's position appears to be losing favor with the appellate courts. But reasonableness must entail a closer analysis than counting up past court decisions and scoring the outcome. In that regard, it is important to note that the Social Security Administration had calculated Mr. Bartels' attorney fees using its formula of excluding interim benefits in October of 1986--well before the caselaw on this question even began develop. See Defendant's Exhibit B.

In excluding interim benefits from the fee calculation, the Secretary states that the practice was based upon the agency's interpretation of the regulation defining "past-due benefits". 20 C.F.R. 404.1703. Like section 406 (b) of the Act, the regulation is silent on the question of interim benefits. It reads in relevant part:

> "Past-due benefits" means the total amount of benefits payable under title II of the Act to all beneficiaries that has accumulated because of a favorable administrative or judicial determination, up to but not including the month the determination or decision is made.

20 C.F.R. 404.1703.

The regulation was first promulgated by the Secretary on August 5, 1980. See 45 Fed. Reg. 52090. Interim benefits, however, were not made available to claimants until 1983 when Congress passed the Social Security Disability Benefit Appeals Act, Pub. L. No. 97-455, § 2, 96 Stat. 2497, 2498 codified as amended 42 U.S.C. § 423 (g) (1). See Condon v.

Bowen, supra., 853 F. 2d at 69. "Therefore, when the Secretary promulagted [sic] section 404.1703, he could not have specifically intended to exclude interim benefits from the definition of past-due benefits." Id. at 72.

The regulation has never been amended to more clearly define past-due benefits with respect to interim benefits. Thus, it is a bit disengenous for the Secretary to claim surprise when the relevant history suggests that the decision to exclude interim benefits from the definition grew not out of the plain language of the Act, or the regulation, but through administrative fiat. To say for the purposes of nonretroactivity that the Secretary's reliance upon his own decision to interpret past-due benefits in a certain way was reasonable, is to say that every decision the Secretary makes is reasonable for the purpose of nonretroactivity. Given such a construct,

it would be impossible to ever hold the Secretary to foreknowledge that a different rule of law might be found. With every subjective and unilateral administrative decision that the courts find to be wholly without basis and completely incorrect statements of the law, the Secretary could always claim "surprise."

The law in this circuit is that the Secretary's interpretation of past-due benefits was never supported by the plain language, or the purpose of the legislative history of statutes granting attorney's the right to recover reasonable fees from a claimant's past due benefits. Gowen v. Bowen, supra, 855 F. 2d at 618-19. The fact that the Secretary once imposed upon the Social Security bar a different view, does not make reliance upon that view reasonable, nor cannot be said that the Secretary did not have foreknowledge that the courts would

eventually find the law differently.

The second factor in the analysis involves weighing the merits of retrospective application by looking at the history of the prior rule, its purpose and effect, and whether the purpose of the new rules as announced by Gowen would be advanced by restrospective application. The history of the Secretary's decision to exclude interim benefits from the calculation of attorney fees lies in the mists of administrative decision-making. It drastically reduced the award an attorney might reasonably expect to recover from a successful benefits appeal, and created "a disincentive for attorneys in representing claimants who accept interim benefits." Id. at 619; Shoemaker v. Bowen, supra 853 F. 2d at 860 n. 5.

The Secretary argues that since Mr. Bartels has concluded his representation of the plaintiff in this case, retrospective application of Gowen would

neither advance or retard the purpose the court's ruling. First of all, the Court is not in a position to predict what future impact denial of additional fees pursuant to Gowen would have on Mr. Bartels or any attorney's willingness to take on new Social Security cases. Moreover, as previously noted, the mere fact that retrospective application does not advance the purpose of the new rule, does not preclude retroactivity. Cash v. Califano, supra.

This leads then to the question whether retrospective application would work any inequity. Since the court has already found that the Secretary's reliance upon his decision to exlcude [sic] interim benefits from the definition of past-due benefits was not reasonable, it cannot be said that the Secretary would suffer any injustice through the retrospective application of Gowen. Yet the Secretary points out that retospective

[sic] application may work a hardship upon the claimant, Mr. Bartels' own client, since overpayments of past-due benefits would be subject to recoupment by the Secretary. 42 U.S.C. § 423 (g) (2) (A). It is, of course, up to the Secretary to decide whether or not to pursue recoupment, and this argument, as with much of the Secretary's other arguments on this motion, essentially seeks to shift the effect of its own mistaken practices onto other parties.

Furthermore, the interim payments made to the claimant were, as the court in Gowen explained, "loans" made by the Secretary and could have been recouped anyway had Mr. Bartels not succeeded in his efforts to overturn the Secretary's initial denial of benefits. Id. at 619. It is now clear from Gowen that up to twenty-five percent of those loans to the claimant could have been, and should have been withheld by the Secretary for payment

as attorney fees. It cannot be said that the plaintiff's claim to those sums ever properly vested. On balance then, after considering all the foregoing, the Court is convinced that the ruling in Gowen should be applied retrospectively.

Unfortunately, the submissions from both parties makes it difficult for the court to determine exactly what amount is still owed Mr. Bartels. He contends the total of the fees to which he is entitled is $2,693,17 [sic] of which only $989 was paid to date. As the order of April 16, 1987 states, the fees should include not only the $1,013 this Court awarded for his work at the district Court level, but also any fees the Secretary finds were earned at the administrative level. In its brief, the Secretary appears to be of the opinion that the order meant to award only $1,013 or one-fourth of the claimant's past-due benefits, whichever is less. There is no mention of the fees approved

for work at the administrative level, which Mr. Bartels contends is $1,678.17. To exclude this sum would be contrary to the court's original order awarding Mr. Bartels "$1,015.00, from the past-due benefits due the plaintiff herein . . . in addition to any fees found to be due for representation at the administrative level . . . . " Op. at 3.

IT IS, THEREFORE, ORDERED that the Secretary compute, certify, and pay Mr. Bartels fees and costs pursuant to 42 U.S. C. §406 (b) (1) less those fees already paid, and any fees due for his representation at the administrative level, or twenty-five percent of the plaintiff's past-due benefits as that term is defined by Gowen v. Bowen, supra, whichever sum is less.

IT IS FURTHER ORDERED that the motion of Mr. Bartels to hold the Secretary in contempt of the court's April 16, 1987 order be, and it is hereby, denied.

Dated this 27th day of March, 1989.

/s/Garnett Thomas Eisele
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2180EA

Louie Pittman, Appellee,

v.

Louis W. Sullivan, M.D.,
Secretary of Health and Human Services,
Appellant

No. 89-2552EA

Wayne E. Ziegenhorn, Appellee,

v.

Department of Health and
Human Services, Appellant.

Order Denying Petition for
Rehearing and Suggestion for
Rehearing En Banc

Appellees' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judgments voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

September 19, 1990

Order Entered at the Direction of the Court:

/s/Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX E

RELEVANT STATUTORY PROVISIONS

20 C.F.R. § 404.1720 (b) (4), provides in pertinent part:

> (b) **Charging and receiving a fee.** (1) The representative must file a written request with us before he or she may charge or receive a fee for his or her services.
>
> * * * *
>
> (4) If the representative is an attorney and the claimant is entitled to past-due benefits, we will pay the authorized fee, or a part of the authorized fee directly to the attorney out of past-due benefits subject to the limitations described in § 404.1730 (b) (1). If the representative is not an attorney we assume no responsibility for the payment of any fee that we have authorized.

20 C.F.R. § 404.1730 (b), provides in pertinent part:

> (b) **Fees we may authorize--(1) Attorneys.** Except as provided in paragraph (c) of this section, if we make a determination or decision in favor of a claimant who was represented by an attorney, and as a result of the determination or decision past-due benefits are payable, we will pay the attorney out of the past-due benefits the smallest of--
>
> (i) Twenty-five percent of the

total of past-due benefits;

(ii) The amount of the fee that we set; or

(iii) The amount agreed upon

between the attorney and the claimant represented.

20 C.F.R. § 404.501 (a) (8) provides in pertinent part:

> (a) **In general.** Section 204 of the Act provides for adjustment as set forth in §§ 404.502 and 404.503, in cases where an individual has received more or less than the correct payment due under title II of the Act. As used in this subpart, the term "overpayment" includes a payment in excess of the amount due under title II of the Act, a payment resulting from the failure to impose deductions or to suspend or reduce benefits under sections 203, 222 (b), 224, and 228 (c), and (d), and (e) of the Act (see Subpart E of this part), a payment pursuant to section 205 (n) of the Act in an amount in excess of the amount to which the individual is entitled under section 202 or 223 of the Act, a payment resulting from the failure to terminate benefits, and a payment where no amount is payable under title II of the Act. . . . The provisions for adjustment also apply in cases where through error:
>
> * * * *
>
> (8) A payment of past due benefits is made to an individual and such payment had not been reduced by the amount of attorney's fees payable

directly to an attorney under section 206 of the Act (see § 404.977).

42 U.S.C. § 406 is as follows:

(a) The Secretary may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Secretary, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Secretary. The Secretary may, after due notice and opportunity for hearing, suspend or prohibit from further practice before him any such person, agent, or attorney who refuses to comply with the Secretary's rules and regulations or who violates any provision of this section for which a penalty is prescribed. The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under

this subchapter, and any agreement in violation of such rules and regulations shall be void. Whenever the Secretary, in any claim before him for benefits under this subchapter, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary shall, notwithstanding section 405 (i) of this title, certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past-due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services. Any person who shall, with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant or beneficiary under this subchapter by word, circular, letter or advertisement, or who shall knowingly charge or collect directly or indirectly any fee in excess of the maximum fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Secretary shall be deemed guilty of a misdeameanor and, upon conviction thereof, shall for each offense be

punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both.

(b) (1) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405 (i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

(2)

No. 90-858

In the Supreme Court of the United States

OCTOBER TERM, 1990

LOUIE V. PITTMAN, ET AL., PETITIONERS

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that a litigant may not, through the mechanism of a contempt proceeding, obtain reconsideration of an order that has become final and non-appealable.

2. Whether the court of appeals correctly held that a district court has no authority to order the Secretary of Health and Human Services (HHS) to pay from general funds an attorney's fee award in disability benefits cases under Section 206(a)(1) of the Social Security Act, 42 U.S.C. 406(a)(1), for services performed by an attorney before the agency.

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SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A33-A55) is reported at 911 F.2d 42. The opinions of the district court in *Pittman* v. *Secretary of Health & Human Services* (Pet. App. B56-B72) and *Ziegenhorn* v. *Bowen* (Pet. App. C73-C93) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1990. A petition for rehearing was denied on September 19, 1990. Pet. App. D94-D95. The petition for certiorari was filed on November 30, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. *Facts Relating to Petitioner Ziegenhorn*

1. Petitioner Ziegenhorn had received disability insurance benefits prior to February 28, 1984, when the Social Security Administration (SSA) determined that his disability had ceased and terminated his benefits. Ziegenhorn then filed a complaint in the district court challenging the termination of his benefits. While the case was pending, Congress enacted the Social Security Disability Benefits Reform Act of 1984 (the 1984 Reform Act), which, among other things, provided a new standard to be used in determining whether a beneficiary's disability had ceased. 42 U.S.C. 423(f). On the Secretary's motion, the district court remanded the case for further review under the new standard. See Pet. App. C73.

2. While the case was on remand, Ziegenhorn elected to receive interim disability benefits under 42 U.S.C. 423(g).[1] See Pet. App. A34. In October 1986, the Secretary reinstated Ziegenhorn's benefits. Excluding interim benefits already paid, Ziegenhorn's past-due benefits totaled $3,958.70. *Id.* at A36.

3. The Social Security Act authorizes a court to award an attorney's fee of up to 25% of past-due benefits awarded by the court. 42 U.S.C. 406(b)(1). This fee is to be paid "out of, and not in addition to, the amount of such past-due benefits." *Ibid.* Accordingly, the Secretary withheld 25% of the past-due benefits, for payment of authorized

---

[1] 42 U.S.C. 423(g)(2)(A) provides that where "the final decision of the Secretary affirms the determination that [a claimant] is not entitled to such benefits, any benefits paid * * * pursuant to such election * * * shall be considered overpayments." Such "overpayments" are subject to recoupment by the SSA pursuant to 42 U.S.C. 404(a)(1) unless "recovery would defeat the purpose of [the Act] or would be against equity and good conscience." 42 U.S.C. 404(b).

attorney's fees, and released the remainder to the claimant. Pet App. A36.

4. In April 1987, the district court awarded Ziegenhorn's attorney (Anthony Bartels) a fee of $1,015, or 25% of Ziegenhorn's past-due benefits, whichever was less, for his representation of Ziegenhorn in the district court. Pet. App. A36. As the district court subsequently noted, the order "was silent on the question of how the Secretary was to calculate attorney fees from the claimant's past due benefits * * * [although,] as Mr. Bartels [was] aware, it had been previously the opinion of this court that interim benefits could be excluded from attorney fee calculations." Pet. App. C77. Bartels did not appeal this order.

5. The Social Security Act similarly authorizes the Secretary to make an award of a reasonable attorney fee of up to 25% of past-due benefits awarded by the agency in administrative proceedings. 42 U.S.C. 406(a). As with fees awarded by the district court, the fee for representation of the claimant before the agency is to be paid "out of such past-due benefits." *Ibid.* In July 1987, the Secretary determined reasonable attorney's fees for Bartel's services at the administrative level would be $1,618.17. The Secretary then released to Bartels the $989.67 withheld, representing 25% of Ziegenhorn's past-due benefits. Pet. App. A36-A37.

6. In 1988, the Eighth Circuit held in *Gowen* v. *Bowen*, 855 F.2d 613 (1988), that, for the purpose of calculating attorney's fees under 42 U.S.C. 406, the term "past-due benefits" includes "interim benefits." In December 1988, several months after *Gowen* was decided, and over a year after the district court decision in *Ziegenhorn* became final and nonappealable, Bartels filed a motion in the district court to hold the Secretary in contempt for failure to comply with the court's April 1987 order awarding fees. Bartels claimed that the Secretary had disobeyed the order by not including "interim benefits" as part of "past-due benefits."

The motion also stated that Ziegenhorn had refused to pay the balance of the attorney's fees owed.

7. Because its April 1987 order did not require the Secretary to include interim benefits as part of past-due benefits, however, the court denied the contempt motion. Nonetheless, the court ruled that *Gowen* should apply retroactively and, on that basis, ordered the Secretary to pay Bartels the administrative fee authorized by the Secretary plus the balance remaining on the court-ordered fee ($25.33), or 25% of Ziegenhorn's past-due benefits as defined by *Gowen*, whichever was less. Pet. App. A37-A38.

B. ***Facts Relating To Petitioner Pittman***

8. The SSA terminated the disability benefits of Louie V. Pittman and, after exhausting his administrative remedies, Pittman filed suit in district court. Following enactment of the 1984 Reform Act, his case was remanded and, on remand, his disability benefits were restored. The total benefit to the plaintiff from the final administrative decision was $12,903.60, of which $8,040.20 had already been paid as interim benefits, $4,187.00 constituted the unpaid past-due benefits and $676.40 represented benefits paid erroneously following the initial termination.

9. Under 42 U.S.C. 406(b)(1), the district court awarded Pittman's attorney, Bartels, a fee of $1,782.16 or 25% of Pittman's "past-due benefits," whichever was less, for representing Pittman at the district court level. The district court expressly held, however, that "past-due benefits" did not include "interim benefits" for the purpose of calculating the fees to be paid to Bartels. Pet. App. A38.

10. In July 1987, the Secretary released $1,046.82 to Bartels. This amount represented 25% of Pittman's "past-due benefits," not including "interim benefits." Bartels then filed an appeal from the fee award, which the Eighth

Circuit consolidated with *Gowen* v. *Bowen*, *supra*. The court of appeals ultimately held that, for purposes of Section 406(b)(1), "past-due benefits" included "interim benefits," and it remanded *Pittman* for recalculation of the fees due plaintiff's counsel. Pet. App. A38-A39.

11. On February 2, 1989, following the remand, SSA authorized Pittman's attorney to charge a fee of $1,254.16 under 42 U.S.C. 406(a) for representing Pittman at the administrative level. The Secretary advised Bartels that, pursuant to the district court order, the agency had released to Pittman all amounts beyond the $1,046.82 already transferred to Bartels and that Bartels would therefore have to look to Pittman for the remainder of his fee. Pet. App. A39.

12. Bartels responded by filing a motion in district court to hold the Secretary in contempt for failing to withhold, and pay to Bartels, 25% of the "interim benefits" as part of the plaintiff's "past-due benefits." He sought the additional $735.34 ($1,782.16 less $1,046.82) awarded by the district court based on interim benefits. He also requested that the Secretary be required to pay him the $1,254.16 awarded by the Secretary for counsel's representation during administrative proceedings. Bartels argued that Pittman was unable and unwilling to pay these fees and that the Secretary should be responsible for recouping this amount from the plaintiff by withholding future amounts from the plaintiff's benefits, as authorized by 42 U.S.C. 404(a)(1). Pet. App. A39-A40.

13. The district court denied the contempt motion. The court, however, ordered the Secretary to pay Bartels the balance owing on the court-ordered fee ($735.34), as well as the administrative fee authorized by the Secretary. The court further ordered the Secretary to recoup these amounts from Pittman's future disability benefits. Pet. App. A39-A40.

C. Proceedings On Appeal

14. On the consolidated appeal, the court of appeals held that the district court properly had declined to hold the Secretary in contempt in both *Ziegenhorn* and *Pittman*, because the Secretary was never in violation of the district court's order. Pet. App. A40, A43. In *Ziegenhorn*, moreover, the court of appeals held that Bartels' attempt to seek retroactive application of the *Gowen* decision through a contempt proceeding constituted an impermissible collateral attack on the district court's April 1987 order, which had long since become final and non-appealable. Pet. App. A40-A41.

15. Although Bartels' request for relief in *Pittman* did not constitute a collateral attack (since the case was on remand from the first appeal), the court of appeals concluded that the district court erred in ordering the Secretary to pay Bartels the authorized administrative fee and in directing the Secretary to recoup that amount from Pittman, because the Secretary's authority to award administrative fees under 42 U.S.C. 406(a) is exclusive and unreviewable. Pet. App. A43-A44. The court of appeals further held that the district court lacked authority to order the Secretary to pay the balance remaining on its fee award out of general social security funds because of the government's sovereign immunity. Pet. App. A45.

16. The court of appeals further concluded in *Pittman*, however, that the district court could direct the Secretary to pursue recoupment of the erroneously paid-out interim benefits for purposes of an award of fees for services at the district court level under 42 U.S.C. 406(b)(1), except to the extent the Secretary must waive recoupment as against equity and good conscience under 42 U.S.C. 404(b). Pet. App. A47-A50.

ARGUMENT

1. The petition arising from the *Ziegenhorn* case should be denied. Petitioner claims (Pet. 27-32) that an order that had been final for more than a year could be collaterally attacked and modified on Ziegenhorn's application for contempt. Petitioner Ziegenhorn sought to have the Secretary held in contempt for failure to comply with the district court's April 1987 order awarding attorney's fees. But, as both the district court (Pet. App. C77-C78) and the court of appeals (Pet. App. A40) held, the Secretary fully complied with both the express terms and the intent of the April 1987 order. Accordingly, the district court properly denied petitioner's motion for contempt.

The illogic of petitioner's position is apparent. Contempt punishes disobedience of an *existing* order or rule (18 U.S.C. 401(3)). If the order had to be amended to reach the result petitioner sought, it could not have been contemptuous to oppose the amendment. Quite obviously, a district court does not abuse its discretion in denying a motion for contempt where the party against whom contempt is sought has not violated a lawful writ, order, rule, decree or command of the court. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

The court of appeals also correctly held (Pet. App. A40-A41) that once the district court had denied Bartels' motion for contempt it should not have gone on to award him other relief. As the court of appeals held, Bartels' effort through the contempt proceeding to amend the final judgment to obtain retroactive application of *Gowen* constituted an impermissible collateral attack on the district court's April 1987 order. As this Court has held, "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed." *Local 28 of the Sheet Metal Workers' Int'l Ass'n* v. *EEOC*,

478 U.S. 421, 441 n.21 (1986), quoting *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948); *United States* v. *Rylander*, 460 U.S. 752, 756 (1983).[2]

Moreover, contrary to petitioner's suggestion (Pet. 28), reopening the final judgment was not "the only relief available to him." As he had in both the *Pittman* and *Gowen* cases, Bartels was free to file an appeal from the district court's April 1987 order in *Ziegenhorn* if he believed the order denied him all the relief to which he was entitled. Having failed to appeal the order, however, petitioner is not entitled to another opportunity to challenge that order by way of a motion for contempt. As the Third Circuit has observed, "any other rule would set to nought the time limits for seeking appellate review set forth in Fed. R. [App.] P. 4(a)." *United States* v. *Millstone Enters., Inc.*, 864 F.2d 21, 23 (3d Cir. 1988). Cf. *United States* v. *Ryan*, 402 U.S. 530, 532 n.4 (1971) (the validity of an order may not be challenged in a contempt proceeding if the opportunity for effective review of the order was available at an earlier stage).

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[2] The authorities cited by petitioner for the proposition that a district court has inherent authority to punish for contempt and, in appropriate circumstances, to fashion an equitable remedy (Pet. 27-31) do not support the proposition that a court may exercise its contempt power in the absence of contemnible conduct, or use its equitable powers to reopen final and unappealable judgments. Rather, they demonstrate that a court may fashion an equitable remedy to correct a continuing violation of an outstanding order or duty, even if the same conduct were sanctionable by way of contempt. See *Smith* v. *Bounds*, 813 F.2d 1299, 1303 (4th Cir.), cert. denied, 488 U.S. 869 (1987) (the contempt power of a court does not limit its discretion to fashion equitable remedies for a continuing constitutional violation); *Berger* v. *Heckler*, 771 F.2d 1556, 1569 (2d Cir. 1985) (a court may fashion an equitable remedy to prevent continued non-compliance with a previous order even absent a finding of contempt); *Alexander* v. *Hill*, 707 F.2d 780, 783 (4th Cir.), cert. denied, 464 U.S. 874 (1983).

2. The petition in *Pittman* should also be denied. In *Pittman*, petitioner challenges (Pet. 10-27) that portion of the court of appeals' decision holding that the district court lacked authority to order the Secretary to pay Bartels the full amount of administrative fees authorized by the Secretary.[3] The court of appeals correctly held (Pet. App. A43-A44) that, under 42 U.S.C. 406(a),[4] the Secretary has exclusive authority to award attorney's fees for services performed at the administrative level and that such awards are not subject to judicial review. See *Copaken* v. *Secretary of HEW*, 590 F.2d 729, 731 (8th Cir. 1979) (per curiam). See also *Guido* v. *Schweiker*, 775 F.2d 107, 109 (3d Cir. 1985); *Whitt* v. *Califano*, 601 F.2d 160, 161-162 (4th Cir. 1979).[5]

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[3] The petition does not seek review of the court of appeals' conclusion (Pet. App. A44) that the district court also lacked authority to direct the Secretary to recoup past-due benefits released to the claimant for payment of the administrative fee award. Instead, the petition contends that the court erred by not directing respondent to pay the administrative attorney fee, regardless of the availability of recoupment, on the theory that the government must stand good for the fees released "due to its own alleged 'error.'" Pet. 13.

[4] The court of appeals mistakenly referred to Section 406(b)(1), instead of 406(a), in its opinion. Pet. App. A43.

[5] *Webb* v. *Richardson*, 472 F.2d 529 (6th Cir. 1972), cited by petitioner (Pet. 22, 24-25), is not to the contrary. Although the court of appeals in *Webb* held that the courts have authority to determine an appropriate attorney's fee for services at both the administrative and district court levels, it does not suggest that a fee award established by the Secretary would be subject to judicial review. In any event, *Webb* stands alone among the circuits in holding that the district court has authority to award counsel fees for representation before the agency. See *Guido* v. *Schweiker*, 775 F.2d 107, 108-109 (3d Cir. 1985) (the Social Security Act does not grant either court or agency the authority to set fees in the other's jurisdiction); *Whitt* v. *Califano*, 601 F.2d 160 (4th Cir. 1979) (courts have no statutory authority to award counsel fees for representation before the agency); *Gardner* v. *Menendez*, 373 F.2d 488 (1st Cir. 1967) (same).

Whether the district court can review and enforce the Secretary's award, however, is not at issue here. See note 3, *supra*. Rather, the question on this petition is whether a district court can enforce an administrative fee award that the Secretary has authorized to be paid from past-due benefits under 42 U.S.C. 406(a) by ordering the Secretary to pay such a fee directly out of general social security funds. See Pet. 24. The answer, correctly provided by the court of appeals, is that a court may not.

Under 42 U.S.C. 406(a), the Secretary may fix a reasonable fee to compensate an attorney for services performed by the attorney at the administrative level. If as a result of a favorable determination the claimant is entitled to past-due benefits, the Secretary may certify an attorney's fee for payment "out of" the "past-due benefits" in an amount up to 25% of the claimant's past-due benefits. 42 U.S.C. 406(a). As the court of appeals held (Pet. App. A45), 42 U.S.C. 406(a) contemplates payment of an attorney's fee award by the *claimant*—either out of the claimant's past-due benefits or out of the claimant's own funds—and not by the government out of general social security funds.

Section 406(a) cannot be construed to waive the *government's* immunity for attorney's fees. *Cornella* v. *Schweiker*, 728 F.2d 978, 987 (8th Cir. 1984) (42 U.S.C. 404 does not allow a claimant "to recover fees against the government"). Absent such a waiver, the United States is not liable for the payment of a fee award out of general funds. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983). For this reason, petitioner simply is wrong in suggesting that merely because the Secretary "has already set an administrative award for the petitioner in this case * * * [a] federal court [may] order the actual payment of that award" (Pet. 24). The decision below correctly applies *Ruckleshaus* and is not in conflict with decisions of other circuits. Further review is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys

FEBRUARY 1991